IN THE MISSOURI SUPREME COURT

No. SC86287

LANCE SCOTT,
Appellant/Cross-Respondent,

V.

BLUE SPRINGS FORD SALES, INC.,
Cross-Appellant/Respondent,

and

ROBERT C. BALDERSTON,
Respondent.

APPEAL FROM THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
THE HONORABLE MARCO A. ROLDAN
DIVISION 16

REPLY BRIEF OF APPELLANT/CROSS RESPONDENT

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REPLY TO BALDERSTON'S AND BSF'S RESPONSE STATEMENTS OF FACT

Scott objects that, from the outset, Balderston's "statement of facts" is replete with characterizations of Scott's claims and facts that tend to mislead, false statements, unsupported statements of fact, and arguments. For brevity Scott will point out only some examples here:

1) On his page 5, summarizing Scott's claims, Balderston drops all mention of "conspiracy". In fact, all of the three claims submitted against Balderston emphasized the assertions that he had "acted in concert" with others at BSF, or had "acted to help suppress or conceal" that the wrongs had previously occurred. See the verdict directing instructions against Balderston attached as Scott Reply App. pages 1-3. And a central issue, throughout the case, was whether Balderston, with his May 11, 2000 letter, was "joining a pre-existing conspiracy". See the discussion at Tr. 1567.

2) On his page 6 Balderston states that "at the time of the sale, the title to the vehicle did not indicate 'salvaged' and the Carfax report obtained by BSF at the time did not reveal a salvage title." But BSF did not run its first Carfax report on this vehicle until April 1, 1994, long after both the sale of the vehicle on March 5 and the March 18 report by Ford Motor Company to BSF that the vehicle had a previous salvage title. (Ex. 6; SLF 28, 31-33, Bounacos Carfax deposition pages 1, 16-17, 21; Ex. 51) (Note that BSF's statement of facts tries to push the same misimpression.)

3) On his page 8 Balderston states that Young testified, at Tr. 626-7, that he did not talk with Balderston about this in February of 2000. Those pages show no such testimony. And as Scott's statement of facts shows, Young reported to Balderston, and

did indeed talk with Balderston and go over the file with him at some point prior to Balderston writing the May 2000 letter to Scott.

4) On his page 8 Balderston states that Scott "had retained a lawyer" before talking with Howe, Young, Harvey, citing Tr. 399. But the testimony at Tr. 399 (and at Tr. 404-5) shows only that Scott hired a lawyer at some point "in 2000" and that prior to talking with them he had "spoken" with a lawyer.

5) On his page 8 Balderston states that sometime in early May, 2000, Billy Harvey spoke with Mr. Balderston about the Scott vehicle. But Billy Harvey's testimony certainly can be construed to indicate that he spoke with Mr. Balderston and Mr. Young about the Scott vehicle on February 4, 2000. Tr. 494-503. It would be fair to say that the testimony of Balderston, Young and Harvey as shown in the trial transcript collectively is full of conflicts and remarkable inconsistencies on such questions relating to discussions about Scott and the Scott vehicle as the dates of conversations among them, who was involved, and the things said in conversations.

6) On his page 9 Balderston states, without attribution, that "There was no evidence that Mr. Balderston had any knowledge of the salvage title issue with the Scott vehicle before May 2000." Scott submits that the evidence as summarized in his Statement of Facts makes a very strong case – short of an outright admission by Balderston – showing that he indeed had such knowledge.

7) On his page 10 Balderston states, without attribution, that "There was no direct evidence that Mr. Balderston took any steps to hide or conceal the fact of the salvage title from Scott." Scott submits that the evidence in his Statement of Facts strongly indicates

that that is exactly what he and his managers were doing all the way back in 1994 and through 1999.

REPLY ARGUMENT

I. The Trial Court Erred In First Refusing To Submit Scott's § 407.025 Claim Against BSF For Punitive Damages To The Jury On The Ground That § 407.025 Reserved Punitive Damages Claims To "The Court", And Then In Refusing To Make Its Own Determination On This Claim On "Election Of Remedies" Grounds, Because Scott Was Entitled To Have His Claim Tried To The Jury And Face No "Election" Question, In That The Provision Of § 407.020 As Applied By The Trial Court Violates Art. I, § 22(A) Of The Missouri Constitution.

Section 407.025.1 does not prohibit jury trial of punitive damages claims

BSF begins its response to this point on appeal with the assertion that the language of § 407.025.1, providing that "the court" may award punitive damages, reserves the award of punitive damages to the judge and not the jury. BSF relies on Dover v. Stanley, 652 S.W.2d 258, 261 (Mo.App. 1983).

The Dover opinion cites only the language of the statute for its statements on this point, and these statements are arguably dicta. Scott submits that these statements in Dover are dubious at best. See the discussion in State ex rel. Diehl v. O'Malley, 95 S.W.3d 82, 92 (Mo. banc 2003). Moreover, as noted in Kobs v. Arrow Service Bureau,

Inc., 134 F.3d 893, 896-7 (7th Cir. 1998), the word "court" in the remedial portion of numerous statutes has been determined to encompass trial by both judge and jury (citing Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005 (1974), relied upon by this Court in Diehl). Similarly, Scott submits that § 407.025.1 should be construed as not prohibiting trial by jury on punitive damages claims.

BSF's attempts to distinguish *Diehl*

BSF first weakly attempts to distinguish Diehl by saying that the plaintiff in Diehl did not seek equitable relief, while Scott sought equitable relief in addition to his claims for damages. But as noted in Curtis, supra, at p. 197, a case where the plaintiff clearly sought both legal and equitable relief: "there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief". And the right to trial by jury on legal claims in such cases where both legal and equitable claims are asserted is zealously guarded in Missouri, see State ex rel. Leonardi v. Sherry, 137 S.W.3d 462, 473 (Mo.banc 2004).

BSF next attempts to distinguish Diehl by saying that this Court in Diehl did not specifically address whether the right to trial by jury applies both to claims for actual damages and to claims for punitive damages. This argument ignores the fact that in Diehl this Court specifically held that the plaintiff had the constitutional right to have his claims for damages – including both actual and punitive damages – tried by a jury.

But ignoring that aspect of Diehl, BSF proceeds with arguments relying on Smith v. Printup, 254 Kan. 315, 866 P.2d 985 (1993) (which BSF repeatedly refers to as "Smith v. Printoff"). While Scott submits that Diehl has already decided this issue, he will still

address BSF's Smith arguments.

In Smith the Kansas Supreme Court argued (at 866 P.2d 997-8) that "if the legislature or courts have the power to abolish punitive damages altogether, then our legislature certainly has the right to modify the method by which those damages are determined", and that "punitive damages may be regarded as equitable in nature" (relying in this "equitable in nature" argument on comments in Digital & Analog v. North Supply, 63 Ohio St.3d 657, 662, 590 N.E.2d 737 (1992)).

Scott submits that there is no logic in the former argument, since 1) legislatures have always been able to alter or abolish most kinds of claims that would have been tried by juries at common law (certainly claims like the MHRA claims in Diehl, for example, could be abolished by statute), so that this argument would reduce the constitutional right to jury trial to meaningless dimensions; and 2) this argument confuses the judicial process by which claims are determined with the substance of the claims themselves. As noted in Fust v. Attorney General for the State of Missouri, 947 S.W.2d 424, 430 (Mo.banc 1997) (incorrectly cited by BSF as "Fust v. Fust"), a statute providing that one-half of a punitive damages award shall be deemed to be in favor of the State does nothing that "interferes with the judicial function", since it only affects the claim to punitive damages itself; by contrast, a provision that the claim could not be determined by a jury would certainly be directed to the judicial process itself.

The latter argument – that punitive damages are equitable in nature – flies in the face of almost all precedent across the country. Digital & Analog itself was overruled on this very point two years later, in Zoppo v. Homestead Insurance Company, 644 N.E.2d

397, 401-2 (Ohio 1994). There the Ohio Supreme Court addressed a statute like the statute in Smith, restricting assessment of the amount of punitive damages to the trial judge. The court held, in analysis exactly parallel to the analysis in Diehl, that this violated the Ohio Constitution provision guaranteeing trial by jury.

Similarly, cases from Curtis to Gipson v. KAS Snacktime Co., 83 F.3d 225 (1996) (which was also cited in Diehl) and Grabinski v. Blue Springs Ford Sales, Inc., 136 F.3d 565, 571 (8th Cir. 1998), hold that the Seventh Amendment guarantees the right to trial by jury in federal court on claims for actual and punitive damages similar to those asserted here (in Grabinski it was § 407.025 claims exactly like those here), and this Court in Diehl (at p. 91) noted that it followed "the same historical analysis" to reach the same result. Moreover, the only federal court published decisions addressing whether the Seventh Amendment guarantees the right to jury trial in federal court on the amount of punitive damages assessed under Kansas law hold – in practical disagreement with the reasoning of Smith – that indeed it does guarantee that right. See Vance ex rel. Wood v. Midwest Coast Transport, Inc., 314 F.Supp.2d 1089, 1091-3 (D.Kan. 2004), and Oleson v. KMart Corporation, 185 F.R.D. 631, 636-7 (D.Kan. 1999). For more discussion see Ryan Fowler, Why Punitive Damages Should Be A Jury's Decision In Kansas: A Historical Perspective, 52 U. KAN. L.REV. 631 (2004).

BSF's "election of remedies" argument

BSF argues that Gollwitzer v. Theodoro, 675 S.W.2d 109 (Mo.App. 1984) (mis-cited by BSF as "Gollwitzer v. Theodora") "is directly on point" here, and "requires an election of remedies" (BSF's brief, p. 88). BSF offers no discussion of Whittom v.

Alexander-Richardson Partnership, 851 S.W.2d 504, 505-6 and 507-9 (Mo.banc 1993), cited by Scott. There is no contention by BSF of inconsistent remedies or theories in this case. Clearly, under Whittom, there should be no "election of remedies" question in this case at all, but only proper measures (in the wording of the judgment) to ensure no double recovery of any single item of recovery. BSF also simply ignores the discussion in Freeman v. Myers, 774 S.W.2d 892, 895 (Mo.App. 1989), distinguishing Gollwitzer, and noting that in that case "plaintiff made an election between two theories before submission to the jury, but the case does not present the issue of the necessity of making the election at that point as against making the election after verdict". Scott here was not even permitted to learn of what the jury (or even the trial judge) would assess in the way of punitive damages under § 407.025, so even if he were pressed to "elect" between awards, he had no opportunity to do so in an informed way. The Tennessee Supreme Court, in Concrete Spaces, Inc. v. Sender, 2 S.W.3d 901, 909 (Tn. 1999), following Freeman in a case highly similar to the instant case, explains:

> [N]o danger of double recovery exists unless the plaintiff actually realizes satisfaction of both forms of enhanced damages. See Freeman v. Myers, 774 S.W.2d 892, 895 (Mo. App. 1989).

See also Miller v. United Automax, ___ S.W.3d ___, 2005 WL 1490977 (Tenn., June 24) (at Westlaw pages 4-5); Altmann v. Altmann, 978 S.W.2d 356, 361-2 (Mo.App. 1998). Note also that BSF similarly ignored Wilkins v. Peninsula Motor Cars, Inc., 587 S.E.2d 581 (Va. 2003), cited in Scott's initial brief.

II. The Trial Court Erred In Denying Scott's Claim Against BSF For Equitable Relief Under § 407.025 Enjoining BSF From Continued Similar Misconduct, Because Scott Established His Right To Such Relief, In That He Had Established BSF's Multiple And Continuing Violations Of § 407.020 Causing Him Loss And Threatening Public Safety.

At the outset it should be noted that BSF does not and cannot dispute almost any of the mountain of unrebutted evidence (recalling that Ex. 100 – Scott Reply Apx. 4-11 – and Ex. 101 through 107 were received as actual evidence for purposes of the claim for injunctive relief) showing the extraordinary pattern of BSF's violations of the Merchandising Practices Act ("MPA") before, during and after the sale of the vehicle to Scott, and then even during the pendency of this suit. Scott's summary, in his argument on this point, of what has been shown by the evidence here stands essentially undisputed.

BSF in its argument once again simply ignores almost all of the authorities and arguments advanced by Scott. It makes no mention of the standard of review discussions in State ex rel. Nixon v. Continental Ventures, Inc., 84 S.W.3d 114 (Mo.App. 2002), and Grabinski v. Blue Springs Ford Sales, Inc., 203 F.3d 1024, 1027-8 (8th Cir. 2000). It blithely cites cases not under the MPA that recite a requirement of showing the lack of an adequate remedy at law and the likelihood of irreparable harm; in doing do it ignores authority cited by Scott to show that these are not required because of the statutory grant of equitable authority in § 407.025. (See also Fogie v. Thorn Americas, Inc., 95 F.3d 645, 654 (8th Cir. 1996), where in a private civil action a permanent injunction against use of usurious contracts was upheld, holding that the plaintiffs' success on the merits

alone "overwhelmingly" demonstrated both the threat of irreparable harm and that the public interest favored enjoining the contracts.) But in any event, Scott submits that even though it was not required, the lack of an adequate remedy at law and the threat of irreparable harm have in fact been shown here: absent intervention by the courts, it is probably only a matter of time before people are injured or killed by these rebuilt wrecks BSF is selling, and it has clearly been shown that BSF is continuing to sell rebuilt wrecks without disclosure to people who normally will not even know they are victims.

BSF next attempts to distinguish State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828 (Mo. App. E.D. 2000). BSF does not quarrel with the fact that Beer Nuts shows that in MPA suits brought by the Attorney General the only prerequisite for issuance of an injunction is the trial court's finding that the defendant has engaged in, is engaging in, or is about to engage in unlawful practices as defined by the Act, and that with such a finding irreparable harm and harm to the public are presumed. But BSF claims that subsection 1 of § 407.100 shows that the trial court has no discretion in suits brought by the Attorney General as to whether to issue such injunctions. But that is clearly wrong: the discretion is exactly like that in § 407.025.1. The applicable subsection of § 407.100 is actually subsection 3, which states:

> 3. If the court finds that the person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter, it **may make** such orders or judgments as may be necessary to prevent such person from employing or continuing to employ, or to prevent

> the recurrence of, any prohibited methods, acts, uses, practices or solicitations, or any combination thereof, declared to be unlawful by this chapter.

(emphasis supplied)

The judgment in this case finding violations of the MPA by BSF would be binding against BSF as a matter of issue preclusion in any action brought by the Attorney General, so that based on Scott's judgment alone a trial court clearly could under § 407.100 – with "discretion" like that under § 407.025 – grant injunctive relief against BSF in an action by the Attorney General. Here, of course, Scott has not only established his own standing by demonstrating his "ascertainable loss"; he has established by unrebutted evidence far more than just these specific violations committed against him by BSF that are embodied in the judgment. Given the standard of review discussions in Continental, Beer Nuts, and Grabinski, and the purposes of the MPA, only an unfortunately hidebound reading of the MPA would permit BSF to escape from injunctive relief here. BSF would have it that the Attorney General would have to bring a separate action, rather than having this disposed of in this action; that certainly would play into BSF's hands, but it would senselessly require additional action in the courts, it would play on the lack of law enforcement behind which BSF and other such dealers hide, it would charge the taxpayers with all such enforcement of the MPA, and it would defeat the purposes of the MPA.

BSF concludes with the rather disingenous statutory-construction argument that Scott could not seek injunctive relief to protect others who may be harmed by BSF's

conduct in the future, in that he did not sue on behalf of such persons.[1] Scott certainly did seek this public-protection injunctive relief from the inception of his suit (see L.F. 15-16). And, of course, the whole point is to prevent such victims from ever becoming victims. By BSF's reasoning, no one could represent such persons – they have not yet become victims, and in that sense do not yet exist. But certainly, BSF's construction of the statute is not correct. As held in Califano v. Yamasaki, 442 U.S. 682, 705, 99 S.Ct. 2545 (1979), "Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." A similar rule of construction should be applied here; the trial court certainly has such power here.

III. The Trial Court Erred In The Trial Of Scott's Claims Against Balderston By Refusing Scott's Offers Of Evidence Concerning Rebuilt Wrecks Sold By BSF In 2000 Through 2002 And Concerning The Grabinski Verdicts/Judgment And The Looney Settlement, Because That Evidence Was

[1] BSF cites § 407.025.2 as authorizing class actions. A closer reading of that subsection shows that it addresses only class actions brought against classes of defendants; it is subsection three that authorizes class actions in general. Also, the last sentence of subsection 2 provides broadly for relief in all claims brought under "this section" – i.e., § 407.025. But in any event liberal construction of § 407.025 and the purposes of the MPA lead to one conclusion – that public-protection injunctive relief is necessary proper certainly under the facts shown in this case.

Highly Probative And Material, Particularly In That It: 1) Was Part Of The Direct Evidence Of Conspiracy, 2) Would Have Rebutted Balderston's Primary Defense Of Good Intentions And Having Adopted Corrective Practices, 3) Would Have Demonstrated Bad Motive In The Letter Sent To Scott, 4) Would Have Impeached The Testimony Of Balderston And His Supporting Witnesses, And 5) Would Have Been Compelling Evidence Of The True Nature Of Balderston's/BSF's Practices.

Standard of Review

Although BSF chimes in with 8 pages of briefing on this point in support of its sole owner, Balderston, neither BSF nor Balderston mention a significant new case that is remarkably apposite on the standard of review and several other aspects of this point on appeal: Stokes v. National Presto Industries, Inc., ___ S.W.3d ___, 2005 WL 831363 (Mo.App.W.D., April 12, application to Court of Appeals for transfer to Supreme Court denied May 31, application to Supreme Court for transfer pending).

In Stokes the parents of a minor child brought suit against the manufacturer of a deep fryer for burns sustained when the child pulled on the cord of the fryer and turned it over on himself. The plaintiffs appealed, claiming error in the trial court's refusal to receive evidence of other allegedly similar incidents. The trial court had admitted evidence of three other incidents involving the same deep fryer, but it barred any evidence of incidents involving three other similar fryers made by the same manufacturer, invoking what it called the "single product" rule. The Court of Appeals reversed, holding that the trial court "abused its discretion by applying the wrong

standard of law", and that "the abuse had a material effect on the trial". (Id., at Westlaw p. 2). It noted that the plaintiff had been allowed to introduce evidence of many incidents causing injury or death involving deep fryers made by other manufacturers, establishing "possible defect, risk, or notice". But it held that this did not cure the prejudice to Stokes, because the manufacturer had argued that there was only evidence of these three incidents involving the fryer (despite the fact that the plaintiffs had been prevented from introducing evidence of 24 other possibly similar incidents involving the manufacturer's similar fryers) and that these three all occurred before a warning label was put on the fryer. As the Court of Appeals concluded, the manufacturer "took advantage of the circuit court's erroneous ruling", and "Stokes' hands were tied during closing arguments to rebut (the manufacturer's) argument".

Scott's situation here is similar to that of the plaintiffs in Stokes, only worse: he was left almost completely unable to rebut Balderston's arguments and testimony– which took advantage of the trial court's in limine rulings barring Scott's contrary evidence – that the $25,000 offer was a generous effort simply to do the right thing, and that Balderston and BSF had conscientiously made "drastic" changes after the 1990s to prevent any more sales of rebuilt wrecks.

BSF and Balderston cite case language that "relevancy and materiality must be shown by specific facts sufficient in detail to establish admissibility". But, as noted in Morehouse v. Behlmann Pontiac-GMC Truck Service, Inc., 31 S.W.3d 55, 61 (Mo.App. 2000) (reversing a trial court's refusal to receive a vehicle title history as an "abuse of discretion"):

> The test of relevancy of evidence is not whether the evidence necessarily proves or disproves a fact in issue, but whether it tends to prove or disprove such a fact. [citing Oldaker v. Peters, 817 S.W.2d 245, 250 (Mo.banc 1991)] In that pursuit, the trial court must give weight to the inference most favorable to the party offering the evidence. . . . According to our standard of review, we must view the evidence and permissible inferences most favorably to the plaintiff and disregard contrary evidence and inferences.

BSF'S arguments

BSF first suggests that it is not clear which evidence regarding other vehicle sales is at issue. However, BSF and Balderston go on to discuss the five sales from 2000 to 2002 that are at issue in some detail, recognizing that Scott recited in his Statement of Facts that the offer of proof on these vehicles was at Tr. 1537-1547, and that Ex. 100 and Ex. 2000 also give detailed summaries regarding these vehicle. Ex. 100 and Ex. 2000 are attached as part of Scott's Reply Appendix. BSF also states that Scott did not cite any portion of the record showing his offer of proof regarding the Looney offers being made by Balderston/BSF at the time of the May 11, 2000 letter. That is incorrect. There may be some confusion caused because Scott put many facts relevant to his appeal in throughout the first parts of his Statement of Facts, and others only in the last section on "additional facts on Scott's appeal". See page 36 of Scott's Statement of Facts for discussion of the Looney offers and related facts.

BSF urges that the evidence concerning these five 2000-2002 sales is dissimilar because these vehicles have not been shown to be "salvage". One wonders that BSF doesn't try to say that these sales are different if the vehicles were of a different color than Scott's. And BSF simply ignores most of the reasons why Scott stated that this evidence was relevant.

BSF next urges that these sales are "too remote" in time. But, first, the sales in 2000 were explicitly covered by the time frame asserted in the pleadings as to the continuation of the conspiracy. Second, BSF ignores the fact that the pleadings asserted (and the evidence showed) that BSF continued its coverup on Scott's vehicle all the way up into May of 2000. Third, since BSF is raising these points, it is worth pausing to note that these sales would have been most relevant – would have been compelling evidence – on the issue of punitive damages. Finally, BSF urges the red herring that admitting evidence of these five vehicles would have caused a series of "mini-trials". There were no such minitrials in this case, even on the other similar wrecked vehicle sales.

BSF next argues that the fact and amount of the jury verdict/judgment against BSF in the Grabinski case was properly barred, arguing that Olsten v. Susman, 391 S.W.2d 328 (Mo. 1965) supports the refusal to admit that evidence. (BSF correctly notes that the trial court based its refusal to admit this evidence on the same position, expressly relying on Olsten as "right on point" regarding "trying to bring in a decision by a jury" in another case. Tr. 84-5) BSF only helps to show that the trial court relied on an improper legal conclusion in barring this evidence.

Olsten is entirely inapposite. In Olsten the defendant's counsel had used

arguments that all but told the jury about a previous verdict that undisputedly was not binding in any way against the plaintiff or admissible in the case. But the judgment in Grabinski is binding against BSF, the issues actually determined against BSF there can be used against BSF as a matter of issue preclusion in other suits brought by other parties (to the extent relevant to the issues in such cases). And the very fact that a jury and court did hit BSF with this judgment only goes to make numerous very proper points here. This is "prejudice" that is proper; this is evidence that was necessary for Scott to have a fair trial of his case, certainly against Balderston. Astonishingly enough, even the bare fact that BSF lost in the Grabinski case was kept hidden from the jury. This is a classic example of improperly keeping the truth, the light of day, out of the courtroom.

Toppins v. Miller, 891 S.W.2d 473, 475 (Mo.App. 1995), cited by BSF as indicating that "the amount of the prior verdict has no relevance", says no such thing: Toppins holds that a settlement with one tortfeasor in a multi-car accident is not relevant to show the negligence of another tortfeasor, nor to assist in calculation of damages (where any credit by reason of the first settlement would be addressed by the trial judge).

BSF (and Balderston) attack the proffered evidence that Balderston/BSF were making settlement offers on Looney in the hundreds of thousands of dollars at the time of the May 11 letter, as barred by the rule against admission of settlement offers. But that rule does not apply here.

As explained in Ellis v. Ellis, 747 S.W.3d 711, 716 (Mo.App. 1988):

> Missouri Evidence Restated Section 408 lays out the black letter statement of the law in Missouri: Evidence of (1) furnishing or

> offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

This is parallel to Federal Rule of Evidence 408.

But the evidence of Balderston's Looney offers was not offered to prove liability for or the invalidity of the Looney claims. By the time this evidence was offered, Balderston had already admitted the BSF wrongdoing in that matter. Following is a passage from Balderston's testimony, at Tr. 1435:

> Q. The handling of the Looney vehicle, I think you have said that was wrong?
>
> A. That was wrong.
>
> Q. It should not have been sold without disclosure either time?
>
> A. That's correct.

Rather, the evidence was offered for the purposes Scott has urged: to show Balderston's/BSF's true motives behind the May 11 offer to Scott, to rebut the central

defenses of good motive asserted by Balderston/BSF, and to impeach Balderston's testimony.

The fact setting of this issue is not of an everyday kind: here we have one offer of settlement that was not just admitted into evidence, but was actually at the center of the evidence in the trial; and the motivation behind that offer was clearly demonstrated by another offer of settlement to a different person on a similar but separate matter of admitted wrongdoing. An "everyday" application of the rule barring evidence of offers of settlement was clearly an incorrect application of the rule here.

While research understandably does not readily show other cases with similar fact scenarios, Scott would cite two cases under F.R.E. 408 and a similar rule as demonstrating the propriety of admitting offers on separate claims to show motive and intent. In Schafer v. RMS Realty, 741 N.E.2d 155, 192 (Ohio App. 2000), in an action by a minority partner against the partnership and other partners relating to a margin call that led to disputes and offers back and forth and ultimately loss by the minority partner, the court held that evidence of the offers was admissible, noting that "the rule makes an exception when evidence is offered for another purpose", and holding that "the jury was entitled to weigh the evidence and make its own judgment about the sincerity, motives, or actions of any of the parties." Similarly, in Hudspeth v. Commissioner of Internal Revenue Service, 914 F.2d 1207, 1214-5 (9th Cir. 1990), an owner of timber sought to admit evidence that the IRS's expert had provided a different valuation of other timber in connection with an offer the IRS had made to another taxpayer, to show a "bias" state of mind on the part of that expert in the timber owner's case. The trial court barred the

evidence under F.R.E. 408. The Court of Appeals reversed, agreeing with the timber owner's argument that showing that state of mind of the expert was a permissible purpose not barred by F.R.E. 408, and holding that the trial court's ruling was an abuse of discretion that was prejudicial to the timber owner.

Scott submits that likewise in this case the motive and state of mind of Balderston in sending the May 11 offer was absolutely central to the case, and that the Looney offers and Grabinski verdict/judgment were simply critical to showing that motive and state of mind. And Scott notes that

BSF's other arguments are for the most part a rehash of matters argued in other points on this appeal.

Balderston's additional arguments

Balderston argues, at p. 14 of his brief, that the evidence concerning the 5 rebuilt wrecked cars sold by BSF in 2000-2002 "would have no tendency to prove the existence of a conspiracy or Mr. Balderston's alleged participation in such an alleged conspiracy". It would appear that Balderston is asserting that Scott was not offering evidence of enough similar rebuilt wreck sales. If, for example, Scott had offered evidence of 500 rebuilt wrecks sold by BSF without disclosure during that time period (and perhaps during the week before trial), then one would suppose that Balderston would be hard-pressed to deny that this would tend to indicate a conspiracy at his dealership, and given his day-to-day involvement and discussions with his managers, his involvement in that conspiracy. But perhaps Balderston would be equally dismissive even of that volume of

evidence – he is unfortunately in good company among CEOs in denying knowledge of massive wrongdoing in his company.

Balderston's summary of the five 2000-2002 sales is incomplete. Scott points instead to Ex. 100 and Ex. 2000 (in the appendix to this reply brief) and to the recitation in the offer of proof in the transcript (Tr. 1537-47). Significant additional facts such as Balderston's own participation in one of the discussions, and the knowledge of BSF of the damage to these vehicles (it had done the repairs itself on several of them) are shown there.

Balderston, at his pages 14-19, refers to the trial court's in limine rulings as support for the barring of the evidence of these five vehicles at trial. But of course, the factual setting at the time of the offer of proof was what mattered; and by then, as Scott has shown, in addition to other reasons for bringing in this evidence, Balderston was getting away with parading himself and BSF as having corrected their practices after the 1990s, with having argued in opening statements and in testimony that the May 11 offer was motivated only to do the right thing, etc.

At p. 21 Balderston continues his incorrect description of Scott's arguments, saying that "Mr. Scott also asserts that the fact and amount of the Grabinski jury verdict 'constitutes direct evidence of acts pursuant to the conspiracy'". But of course Scott's comments along these lines concerned only the five 2000-2002 sales, and Scott actually said that evidence of these sales was "direct evidence of acts pursuant to the conspiracy" (Scott's brief, at p. 121).

At pages 24-28 Balderston argues that Scott invited error, that his questions to Balderston, Young and Barelman invited their statements that BSF and Balderston had changed their practices after the 1990s. Balderston employs selective quotations from passages in these witnesses' testimony. Scott submits that there is no proper reply to this except to refer to longer passages in these witnesses' testimony. Scott submits that their testimony should be reviewed in context, and that any such review will demonstrate that indeed these witnesses blurted out these statements in what could not have been a coincidental, and certainly was not an invited, way. Moreover, if the transcript is given a full review, the constant theme of "the 1990s" is repeated like a drumbeat. That was required of the plaintiff by the trial court's ruling that prohibited him from offering evidence of similar rebuilt wreck sales from 2000 and on. All parties – and certainly Balderston and his managers – were acutely aware of the trial court's rulings on this point.

Balderston also blithely states, at p. 24, that he was asked no questions after direct examination because:

> there was no desire to open up a wide ranging set of issues, including a possible assertion that Mr. Balderston's testimony had either intentionally or inadvertently touched upon the implementation of general remedial or corrective actions beyond the time frame that involved the Scott transaction. In other words, Balderston did not advance a general wide-ranging 'primary

> defense' of having adopted corrective practices at the trial in this cause.

Those statements surely merit the label "disingenuous". That was exactly the defense that Balderston hid behind, and he executed that defense very effectively indeed.

In his last argument Balderston asserts that the "true nature" of BSF's/Balderston's business practices "was not the issue before the jury". Let passages from Balderston's closing argument speak for themselves:

(at Tr. 1702:)

> The plaintiff claims that, well, they're this callous and yet we know from Carl Young, from Scott Verilman [sic.], from Bob, that we're talking about some practices in the 1990s, extend to 1999. Things changed.

(at Tr. 1703:)

> There is also a situation in this case regarding the CarFaxes. They have improved over time. Lessons have been learned and Bob talked to you about that.

(at Tr. 1707-8:)

> And we're trying to ask you to render a verdict that sends a message, to get a brand on what? Because we responded? Because we tried to be fair?

IV. The Trial Court Erred In Overruling Scott's Claims And Pre-Judgment Motion For Attorney's Fees Against BSF Under The Merchandising Practices Act And The Magnuson-Moss Act On The Basis Of The Amounts Awarded To Scott For Punitive And Actual Damages, Because Scott Was Entitled To Recover His Attorney's Fees Under Those Statutes, In That He Had Obtained A High Degree Of Success On His Underlying Claims So That The Denial Of Fees Was An Abuse Of Discretion.

BSF ignores the fact that the trial court did give its reason for denying fees here – apparently exactly the same as the reason given by the trial court before the Eighth Circuit's decision in Grabinski II – denying fees because of the "generous" punitive damages award. BSF offers no argument whatsoever defending that ground for denial of fees under either statute. As stated in Grabinski II (at p. 1028), this "stands the matter entirely on its head . . .".

BSF contends in effect that although "O'Brien relied upon federal case law to provide a framework to determine the appropriate amount of fees" under a Missouri fee-shifting statute, that framework should not be used when the issue is an outright denial of fees. That reasoning appears absurd. And see Dishman v. Joseph, 14 S.W.3d 709, 718 (Mo.App. 2000) (reversing a denial of attorney's fees under R.S.Mo. § 536.087, relying on federal cases such as Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). BSF's idea of "discretion" appears to support entirely arbitrary and unreasoned rulings.

BSF also contends that because the statute at issue in O'Brien had a mandatory fee-shifting provision means, again, that the federal case law framework adopted in O'Brien should be disregarded here. But Grabinski II addressed this (at p. 1027). And other Missouri cases use this same federal case law framework in evaluating attorney fee rulings under "discretionary" Missouri fee-shifting statutes. See, for example, Dishman, supra; Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754, 774 (Mo.App. 1999) (an MHRA case, reversing fee award for failure to award attorney fees for all time reasonably expended in the case, and citing Hensley).

BSF makes much of its offers of judgment. Those offers seem to cut the opposite direction from that desired by BSF: since Scott obtained far greater success than those offers would have given, Scott's decisions to refuse them was proven correct. Moreover, in order to obtain what the jury and trial court found to be a necessary and just result, Scott had to endure serious pressure from the threats intended by those offers of saddling Scott, an individual consumer, with BSF's costs. That is to be commended, not punished. (Similarly, note the highly aggressive attempt by Balderston to obtain attorney fees from Scott. BSF parades this for other purposes; Scott submits that it is significant in that it shows the highly aggressive – and vindictive – attempts by the defendants to intimidate and outspend Scott.)

BSF raises the Gollwitzer case as controlling on "election of remedies" grounds. See, first, Scott's arguments on Point I on Scott's appeal. Note also that BSF's position amounts to saying that Scott should be sandbagged: that even though the trial court permitted his submissions on both fraud and MPA claims, and the trial court expressly

reserved the MPA punitives issues for its own ruling, Scott could be held to have "elected" and to have lost his claim for attorney's fees under the MPA.

On Scott's claim for attorney's fees under Magnuson-Moss BSF cites Hibbs v. Jeep Corporation, 666 S.W.2d 792, 799-800 (Mo.App. 1984). In Hibbs the trial court did not state its reason for denying fees, so all possible reasons for the denial were available to support that ruling on appeal. Here, the trial court stated its reason, which, as the Eighth Circuit said, "stands the matter entirely on its head". Also, in Hibbs the fee submissions apparently were both faulty and requesting large amounts of fees for claims against defendants who were no longer in the suit. No such contention is raised here. But perhaps most importantly, the federal cases on discretionary fee-shifting statutes, especially the later Blanchard v. Bergeron, 489 U.S. 87, 89 n. 2, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989), make it clear that, as stated in Grabinski II (at p. 1028), "awarding attorney's fees to successful plaintiffs is indeed the rule rather than the exception". While Hibbs is clearly distinguishable, Scott submits that it also would not withstand scrutiny under applicable federal case law standards.

BSF concludes with a remarkably weak new argument that Scott's claims for fees and costs are barred by Supreme Court Rule 77.04, the offer of judgment rule, because Scott did not recover more in actual damages under Magnuson-Moss than BSF offered in its offers of judgment. But BSF's offers were addressed to all of Scott's claims, not just to his Magnuson-Moss claims. And nothing in the rule supports BSF's argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03 and complies with the limitations of Rule 84.06(b). The Microsoft Word program indicates that the total number of words contained in this brief, excluding the parts of the brief exempted, is 7,709. This brief has been prepared using Microsoft Word 2000 in 13 point, Times New Roman font. Filed with this brief is an electronic copy of the brief in Microsoft Word, which has been scanned for viruses by the Norton anti-virus program and has been found to be virus free.

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Certificate of Service

The undersigned hereby certifies that two copies of the above Reply Brief of Appellant/Cross-Respondent, and a floppy disk with this brief in Microsoft Word electronic format, were mailed, postage prepaid, this 12th day of July, 2005, to each of the following:

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